UNOPPOSED

ORDER PREPARED BY THE COURT

FILED
OCT 0 8 2010
BRIAN R. MARTINOTTI
J.S.C.

IN RE: ALLEGED MAHWAH TOXIC DUMP SITE LITIGATION

"Applicable To All Cases"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION CIVIL PART
BERGEN COUNTY

CASE NO. 277 MT

MASTER DOCKET NO. BER-L-489-08

CIVIL ACTION

ORDER

THIS MATTER having come before the Court for a Motion to File Information under seal by Sullivan Papain Block McGrath & Cannavo, attorneys for plaintiffs in the "Alleged Mahwah Toxic Dump Site Litigation"; and, the Court having read the Memorandum of Law of Frank V. Floriani, Esq., dated September 14, 2010; and, for the reasons set forth in the Court's opinion attached hereto,

IT IS on this 8th day of October, 2010, **ORDERED** that:

1. Plaintiffs' application to file under seal is DENIED;

2. The terms of the settlement agreement shall remain confidential except that Plaintiff's counsel is instructed to advise the Court of the full amount of the settlement within 14 days;

3. A copy of this order shall be served on all counsel within 5 days.

Dated: October 8, 2010

BRIAN R. MARTINOTTI, J.S.C.

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In Re: Alleged Mahwah Toxic Dump Site Litigation Docket No. L489-08

Before this Court is Plaintiffs' Motion to File under Seal Pursuant to R. 1:2-1 and R. 1:38-11(b) and Application for Modification of Fees Pursuant to R. 1:21-7(f) and (i). These Motions are not opposed.

Facts

The underlying controversy in this case involves alleged damages for personal injuries on behalf of over 600 current and former residents of the community of Upper Ringwood, New Jersey. The environmental issues involved in this case have become publicly known. Articles have been published in The Bergen Record, The New Yorker and ABC News. The United States Environmental Protection Agency designated the area a Superfund Site.

In the Summer and Fall of 2008, Plaintiffs' Counsel, Sullivan Papain Block McGrath & Cannavo P.C. and The Cochran Firm, engaged in extensive settlement discussions with Ford Motor Company ("Ford"), Ford International Services, Inc., Ringwood Realty Corporation, Arrow Group Industries, Chromalloy American Corporation, URS Corporation and URS Group, Inc.(collectively, "the Ford Defendants") and the Borough of Ringwood (collectively, "Ringwood"). A settlement was reached with Defendants. For the purposes of this application, there are three components to the settlement: the settlement with Ringwood, and the settlement with the Ford Defendants, which includes settlements with adults and settlements with minors. The settlement agreement with the Ford Defendants ("settlement agreement") was to remain confidential. The settlement with the Borough of Ringwood, a public entity, could not be

confidential. Likewise, because "Friendly" Hearings needed to be conducted, the settlement with the minor Plaintiffs could not be confidential.[1]

On July 19, 2010, Plaintiffs' Counsel moved for an Order modifying the contingent attorneys' fees pursuant to R.1:21-7(f) and (i). There were several objections and comments filed in response to that application. On August 23, 2010, the Court heard arguments from counsel and comments from several Plaintiffs who appeared. At the conclusion the Court instructed Plaintiffs' Counsel to provide a comparison of the total fee under R. 1:21-7 as it relates to application for modification pursuant to R. 1:21-7(f). Plaintiffs' Counsel was unable to provide this Court with the requested information, as it would, in effect, require breaching the confidentiality provision of the settlement agreement. Plaintiffs' Counsel now makes this application to file certain settlement information under seal pursuant to R.1:2-1 and R. 1:38-11(b) so that the Court can have the information it needs to resolve Plaintiffs' Counsel's Motion for Fee Modification.

Analysis

R. 1:2-1 establishes a presumption in favor of public access:

> If a proceeding is required to be conducted in open court, no record of any portion thereof shall be sealed by order of the court except for *good cause shown*
>
> [R. 1:2-1 (emphasis added)].

In Hammock by Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356, 381-82 (1995), the New Jersey Supreme Court noted that the "good cause" requirement of the rule was not defined, and therefore set forth the guidelines that: 1) there is presumption of public access to court documents; and 2) the party seeking to overcome this presumption in favor of public access bears the burden to convince a court that the interest in secrecy

[1] "Friendly's" were conducted on March 15-16, 29-31, April 121-4, and May 13, 2010.

outweighs this presumption. In Verni ex rel. Burstein v. Lanzaro, 404 N.J. Super. 16, 25 (App. Div. 2008), the Appellate Division explained that a "simple desire for privacy" is inadequate to overcome the public interest in open judicial proceedings, particularly where the underlying issues are those of great public concern, such as health, consumer safety, and corporate responsibility. The Verni court also cited with approval the Appellate Division's holding in Lederman v. Prudential Life Ins. Co. of America, Inc., 385 N.J. Super 307, 319 (App. Div. 2006), which stated that a party seeking to seal a record must show "a specific, serious injury that would result from lifting the seal." Verni at 24.

Subsequent to Verni, the New Jersey Court Rules were amended to incorporate both the "specific injury" and burden of proof standards. Effective September 1, 2009, R. 1:2-1 was amended to redefine "good cause" by reference to a new Rule, R. 1:38-11, which states that good cause to seal exists when:

> (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
> (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection.
>
> [R. 1:2-1, R. 1:38-11].

This case involves considerable matters of public safety. The Mahwah site was utilized by Ford from 1967 to 1971 as a disposal site for waste material. As of July of 2006, 16,000 tons of contaminated soil and paint sludge had been removed. Although the safety of Ford's product itself is not the focus of public concern, there is nevertheless the broader issue of corporate responsibility and how it impacts public health. In Verni, supra, the issue was the risk of socially irresponsible behavior encouraged by vendors of

alcoholic beverages, which led to the tragic injury to the minor plaintiff. Here, the issues of public concern are the health problems allegedly caused by the paint sludge that was introduced into a residential living area, including higher blood levels of lead in the minor residents.

Plaintiffs argue that confidentiality as to the aggregate settlement was a critical reason why a settlement was reached with the Ford defendants, and that without confidentiality, no settlement would have been reached. While this may or may not be true, it does not satisfy the harm required under R. 1:38-11(b). The harm contemplated by the Rule is actual harm, not hypothetical. Because present disclosure will not serve to retroactively void the settlement, the potential harm here is hypothetical.

Plaintiffs also advance the argument that preserving confidentiality "advances New Jersey's policy of favoring settlement of litigation" and that unsealing the agreement would "chill and deter other parties from entering into confidential discussions to settle their disputes without a lengthy trial." Pl's brief at 10, *citing* UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52 (Law Div. 1994). While this may be true, it does nothing to advance plaintiff's argument towards the relevant legal standard, which is a clearly defined and serious injury to an entity and the relative weight of the entity's interest in privacy against the presumption of open court records. In addition, the facts in UMC/Stamford, supra, differ significantly from the facts of this case. There, a non-settling insurer sought disclosure of settlements reached between the plaintiffs and other insurers that were parties to the case. The court's reasoning revolved around the logistics of insurance settlements and the unfair advantage non-settling insurers might gain over settling insurers. Id. at 70. In contrast, in the current case, it is not another

insurer that seeks disclosure in order to frustrate a competitor's settlement strategy, but the Court that requires disclosure in order to determine attorney's fees.

Plaintiffs argue that UMC/Stamford stands for the proposition that "an entity has no right to obtain disclosure from parties who wish to protect confidentiality." Pl.'s brief at 11. However, in the context of UMC/Stamford, "an entity" clearly refers to a private entity such as an insurer, not the Court. Reading "an entity" to mean the Court, rather than a private entity, would mean that UMC/Stamford stands for the proposition that *a court* "has no right to obtain disclosure from parties who wish to protect confidentiality." In light of Verni and the subsequent rules changes, this is clearly an untenable conclusion.

Plaintiffs argue that the settlement monies reflect "confidential business information" rather than information related to health and safety. Pl's brief at 4-5. However, this argument is misplaced. The sealed information lacks the trade secrets that would be "helpful to a competitor" which define confidential business information. Berrie v. Berrie, 188 N.J. Super. 274, 285 (Ch. Div. 1983).

Plaintiffs note that there is already full disclosure of a wealth of probative information relating to the litigation - such as the nonconfidential settlement between Plaintiffs and the Borough of Ringwood, the relative values of the settlement categories, and the attorney fees for each category. While germane to the issues of health, safety, and corporate responsibility, none of Plaintiffs' arguments obviate the insight that the knowledge of the settlement amount would provide, nor are they helpful to this Court in determining whether the modified attorneys' fees are reasonable. "[A] judge must carefully scrutinize an application to seal records or documents 'in a high public interest

case.'" Verni at 23-24 (reasoning that a "profound public interest [exists] when matters of health, safety and consumer fraud are involved . . . independent of the interest of the parties to the litigation" and *citing* Hammock at 379).

Though counsel may have reached an agreement as to confidentiality, this Court is "obliged to make a good-cause determination de novo." Pressler and Verniero, Current N.J. Court Rules, comment 12 on R. 1:38-11 (2011). The Plaintiffs have not satisfied the criteria set forth above which would warrant the record to be sealed. As discussed, the terms of the Ringwood settlement are public. The "Friendly's" were conducted in open court pursuant to court rule. This application also requires court approval. In order for the Court to evaluate both the reasonableness of the infant settlements *vis a vis* the entire settlement and to conduct an analysis pursuant to R. 1:21-7(f), the Court must know the full amount of the settlement. Since this analysis is required pursuant to court rule, the Plaintiffs' application to have the record sealed is denied.

This decision does not affect the status of the confidentiality agreement as between the parties except for the limited purpose of disclosure in order to allow the court to conduct the appropriate fee analysis. Mr. Floriani is instructed to supplement his application for fees by providing the court with the entire settlement amount.